91-2039 (1)

Supreme Court, U.S.
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No. 91 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

Irvin H. Mason, Phyllis H. Mason, and the Mason Engineering Co.,

Petitioners,

v.

The Judges of the U.S. Court of Appeals for the D.C. Circuit In Regular Active Service In Their Official Capacities, and The United States, as Successor to the Panama Canal Co.,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT CERTIORARI

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Questions Presented

1. Does a cause of action in equity for relief from judgment, where a judgment is attacked on grounds a U.S. Court of Appeals failed to accord due process and other rights in rendering an unreasoned, summary disposition, "accrue" immediately under 28 U.S.C. 2401(a) when the summary disposition occurs, or, under equitable principles, not until an available remedy in the same court is attempted, and material information on undisclosed court practices is obtained?

2. Is U.S. sovereign immunity a bar to an independent action in equity for relief from a judgment asserted to be void where: the district court has ancillary jurisdiction over the original parties including the United States, and the complaint can be treated as a F.R.C.P. Rule 60(b) motion?

3. Where a Court of Appeals is confronted with the first impression issues of gravity and complexity presented in Questions 1 and 2 above, is it an abuse of process to render summary disposition?

Parties to the Proceeding

All parties appear in the caption.

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Official and Unofficial Reports

The decision below of the U.S. Court of Appeals for the D.C. Circuit in Irvin H. Mason, Phyllis H. Mason, and the Mason Engineering Co. v. The Judges of the U.S. Court of Appeals for the District of Columbia Circuit in Regular Active Service In Their Official Capacities, and the United States, as successor to The Panama Canal Company, No. 91-5141, decided December 20, 1991, for which review is sought, has been issued for publication, but has not yet appeared in Fed 2d or U.S. App. D.C. Reports. The text is set out in the Appendix at pages 1 thru 6.

The decision below of the U.S. District Court for the District of Columbia in Mason, et al. v. Judges, et al., Civil Action No. 88-3542 (TFH), filed Feb. 26, 1991, has not been published. The text is set out in the Appendix at pages 11 thru 19.

Jurisdiction of the Supreme Court

The judgment of the Court of Appeals below was entered on December 20, 1991. Petitioner filed a petition for rehearing with suggestion for rehearing en banc that was denied by orders filed on March 23, 1992, Appen 7-10. This court has jurisdiction under 28 USC 1254, 2101(c), and Supreme Court Rule 20.4.

Constitutional and Statutory Provisions, etc.

The following constitutional provisions, statutory provisions, and court rules are involved:

Constitutional Provisions:

Fifth Amendment: "No person shall be...deprived of life, liberty, or property, without due process of law...".

Fourteenth Amendment: "No State shall...deny to any person within its jurisdiction the equal protection of the laws." (Section 1)

Statutory Provisions:

28 U.S.C. 43(a): "There shall be in each circuit a court of appeals..."

28 U.S.C. 1291: "The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States..."

28 U.S.C. 2071: "(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."

"(d)... copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the U.S. Courts and made available to the public."

28 U.S.C. 2072: "(b)...rules shall not abridge, enlarge, or modify any substantive right..."

28 U.S.C. 2077 (a): "The rules for the conduct of the business of each court of appeals, including the operating procedures of each court, shall be published. Each court of appeals shall print or cause to be printed necessary copies of the rules..."

28 U.S.C. 2401 (a): "Except as provided by the Contracts Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues..."

Court Rules:

U.S. D.C. Circuit Court of Appeals Local Rules 8(f) and 13(c), in force in 1982. The text is found at Appen 24.

F.R.C.P. Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party...from a final judgment, order, or proceeding for the following reasons:...(4) the judgment is void;...or (6) any other reason justifying relief from the operation of the judgment... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment..."

STATEMENT OF THE CASE

Overview. The complaint in this case contests the legality of certain local rules of the D.C. Circuit Court of Appeals. These rules have recently been criticized on constitutional and other grounds by the D.C. Bar and the Court's Advisory Committee on Procedures (Appen. 25-50; infra p. 24-28). Under the text of these rules as in force from 1973 to 1987, an appeal by petitioners that raised serious issues of law was decided in 1982.

without any explanation by the court of its basis for decision. This is a form of arbitrary decision-making going beyond the unpublished-memoranda "secret law" practice condemned by Justice Stevens in County of Los Angeles v. Kling, 1985, 474 U.S. 936, 938 (dissenting opinion). The published decision below, by a specially appointed panel, has summarily affirmed dismissal of the complaint for clearly erroneous, historically mistaken statute of limitations "reasons". The inadequate reasoning used improperly shields the D.C. Circuit Court from having to face, at this time, the merits of an enlarging controversy over court practices involving a judicial assumption of authority not possessed at common law, never approved by Congress, the bar, or this court, yet which have radically lowered the quality of U.S. appellate court justice.

Origin of the present complaint. In 1982 petitioners appealed to the D.C. Circuit Court of Appeals from a district court dismissal of claims in an amended complaint. It was asserted that Irvin Mason had been terminated for "unsatisfactory" performance by the Panama Canal Company for false reasons, in retaliation for, and to forestall, internal criticism and whistleblower conduct, and that high-ranking Company officials including the Vice President/Lt. Governor thereafter carried out a cavalcade of civil rights violations to drive the Masons and their corporation from the Canal Zone. An investigation was eventually directed by the Secretary of the Army. Despite findings in support of Mason assertions, and the Lt. Governor's sudden resignation, the Company denied relief. The U.S. District Court for the District of Columbia dismissed the various Mason civil rights

violation claims in a Memorandum Opinion on May 11, 1979, on grounds that essentially viewed the Company as not suable in tort for the actions of Company officials. After a trial, the court entered adverse Findings of Fact and Conclusions of Law in regard to the wrongful termination claim on August 24, 1981.

On appeal the Masons raised a number of important issues that had been presented to, but not addressed by, the district court. Notwithstanding, on October 20, 1982, the D.C. Circuit Court affirmed, in Case No. 81-2231, by a summary, order form of decision acting under then Local Rule 13(c) (Appen 24). The order recited affirmance was "for the reasons articulated" in the district court's 1979 and 1981 opinions, without giving any other explanation, Appen 22. Important issues raised on appeal, but not addressed by either court, included:

(1) That Mason's termination was in direct violation of a Congressionally-enacted, Treaty-based provision of the governing Canal Zone Code that required written standards to be used in all fitness determinations;

(2) That the district court had failed to assess the motivation of Company officials under Supreme Court directives by giving weight to overwhelming circumstantial evidence showing that the Company's "reasons" for terminating Mason were false, and had instead improperly held that Mason could prevail only by establishing the truth of criticisms he had voiced of company waste and misconduct;

...

(3) That a key Company employee having personal knowledge Mason's immediate supervisor admitted being coerced into recommending Mason's termination

should have been directed to appear by the court; and

(4) That dismissal of the Mason civil rights claims was improper because of the company's unique juridical status: a direct corporate predecessor had been held suable in tort in jury actions by the Supreme Court; Congressional intent was that the Company should be deemed as private and non-governmental as possible; Congress deliberately exempted the Company from the Federal Tort Claims Act so as not to disturb its unique juridical status.

Post-decision attempt at relief in the same court. On December 6, 1982, the Masons filed a timely petition for rehearing in the D.C. Circuit Court with suggestion for rehearing en banc. The petition vigorously argued that at least seven serious issues were before the Court of Appeals that had not been addressed by the District Court, and that summary dispo-

sition was manifestly inappropriate in view of the importance of the issues and the Court's special responsibility for Canal Zone cases. Rehearing was denied, by simple order, on December 21, 1982.[1]

Factual discoveries in preparing 1983 Petition for Certiorari. The Masons filed a petition for Certiorari on March 21, 1983. It was subsequently denied, in No. 82-1550, on April 18, 1983. In the process of preparing the petition, counsel

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[1]The decision below by the Special Panel mistakenly asserts that the 1982 petition for rehearing "challenged...the disposition of the case without a published opinion," Appen 3. On the contrary, counsel initially argued, exclusively, that "serious" issues had been raised that were not "addressed." As explained hereafter, counsel became aware of relevant factual matters later. The present complaint is now broadly drawn, Appen 50ff. It alleges invalidity of the court's local rules 13(c) and 8(f) in force in 1982, generally, and as applied to the Mason case, on grounds asserting that lack-of-reasons and use of unpublished, non-citeable dispositions are unconstitutional under the 5th and 14th Amendments, and a deprivation of the statutorily-conferred right to an "appeal".

asked the D.C. Circuit Court Clerk's office for statistics concerning the number of summary and unpublished decisions being rendered by the court under its then local rules. He was informed no information was available. (No statistics were reported by the Administrative Office of U.S. Courts on unpublished decisions until the year ending June 30, 1989.) In an effort to get some idea of what was happening, counsel compiled statistics on a three-month period in 1982, selected at random. He discovered that 72.9% of the court's dispositions reported in Fed 2d in that time period were without published opinions. Whether these were accompanied by any explanation could not be determined. In the 1983 Mason petition for certiorari counsel devoted 10 (of 62) pages to urging that this court exercise its power of supervision over an apparently new Court of Appeals practice.

Later discoveries; 1984 Advisory Committee Report. Not until 1985 did counsel first obtain reliable information on the D.C. Circuit Court's practices. In 1985 he learned that the Court's Advisory Committee on Procedures made an unpublished study in 1984 of the court's publication practices covering calendar years 1981-1983. The study revealed that of all cases disposed of by the court, 26.1% received a published opinion. Among the balance, 67% received no explanation, while 6.9% received an explanation that was not published, Appen 35, 36. The study revealed that the court had operated since 1973 under an unpublished "Plan For Publication of Decisions," never disclosed to the bar, which contained a presumption against the publication of opinions.[2] In

[2]Nondisclosure of this important internal rule appears to have been in violation of the publication requirements of 28 USC 2071(d), supra p.4, and 28 USC 2077(a), supra id.

regard to the principal focus of the report, non-citeable, unpublished memoranda explaining the basis for a decision, the study concluded that at least 40% of these memoranda should have been published under the court's undisclosed "criteria" for publication, Appen 37. The Advisory Committee recommended abandonment of the no-citation rule, and public disclosure of the court's operating rules concerning publication.[3] It endorsed the conclusion of an extensive Subcommittee Report that noted serious constitutional problems with a system of decision making that had departed radically from traditional common law, precedent-based stare decisis principles, Appen 37. The Subcommittee further noted apparent conflict with the Due Process, Equal Protection, and First A-

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[3]Appen 37, 38. The Court's present Rule 14, published in 1987, complied with the disclosure request. Along with Rule 11(c) it has replaced prior local rules 13(c) and 8(f).

mendment Right-to-Petition clauses, Appen 38-39.

Complaint filed December 13, 1988. The present complaint was filed on December 13, 1988, in the form of an independent action in equity for relief from judgment, recognized in F.R.C.P. Rule 60(b), supra p.5, as a historic remedy for judgment relief. It asks that Local Rules 13(c), 8(f), and '73 Plan, "be declared unlawful, either in their entirety, or as applied to [the 1982 judgment in] Case No. 81-2231," and that "defendants be directed to institute promptly a rehearing applicable to Case No. 81-2231 by a different panel...under procedures that will assure disposition of all serious issues by counsel in accordance with all applicable requirements of law, including, specifically, a reasoned, published explanation of the basis for decision." Named as defendants, in addition to origi-

nal defendant Panama Canal Company (succeeded in interest by the United States after the recent Canal Treaty with Panama) were the judges of the D.C. Circuit Court of Appeals in regular active service in their official capacities. Since these judges are responsible for the court's local rules, under F.R.A.P. 47, the designation is nominal; they would be subject to recusal if they attempted to pass directly on the issues in the complaint.

Theory of the 1988 Complaint. The basic concept behind the 1988 complaint is that if a federal appellate court is legally required to address serious issues raised on appeal, to explain the basis of its decision, and/or to render a citeable decision published in some form, then an appellant has an enforceable right to obtain redress if this is denied. This right can not be satisfied by resort to petitions subject to discretionary denial.

Where an enforceable federal right exists, the normal course is to file a complaint, as here, in district court.

The 1988 complaint is founded upon several established doctrines of law, principally: (1) equity provides an historic, broad, evolving remedy to obtain relief from judgment by an independent action;[4] (2) since the complaint was filed in the original district court, and in which the appellate judgment under attack was enrolled on mandate, the district court has ancillary jurisdiction, and full power, to examine the judgment;[5] (3) a district court is not only empowered but under a duty to pass on the validity of challenged court rules, including the rules of an appellate court;[6] (4) where

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[4]See Moore's Federal Practice, Vol. 7(1992), p. 60-365 thru-391, esp. 60-371.

[5]See infra, Argument II.

[6]Supreme Court decisions are discussed in the seminal case of Grand Bahamas Pet. Co.v. Canadian Trans., DC Wash 1978, 450 F

the judgment of a court is found to be void, including that of an appellate court, it must be set aside, without time limitation, and this annulment is fully consistent with the principles of res judicata;[7] and (5) the judgment of a federal court that is in violation of due process or other constitutional requirements is subject to being set aside as void.[8]

Supp 447, 449. And see: Ruslan Shipping v. Coscel Pet. Co., CA7 1980, 635 F2d 648, 652; Amstar Corp. v. S/S Alexandros, CA4 1981, 664 F2d 904, 905; Polar Shipping v. Oriental Shipping, CA9 1982, 680 F2d 627, 634; Schiffaharts-gesell-Schaft Leonhardt v. Bottachi, CA11 1984, 732 F2d 1543, en banc 1985, 773 F2d 1528.

[7]For the absence of any time limitation in setting aside a void judgment, see infra. p. 42-43. Where a judgment is void, setting it aside "does not impinge upon the principles of res judicata," Moore's Federal Practice, op.cit., (hereafter "Moore"), p. 60-369. This is true even if the judgment has been affirmed by an appellate court, or by the Supreme Court, id.; Moore notes Kingsbury v. Buckner, 1890, 134 U.S. 650, citing two prior Supreme Court decisions.

[8]In Crosby v. Bradstreet, CA2 1963, 312 F2d 483, 485, a decree found to be in

1988-1991 District Court Proceedings. After the complaint below was filed, the U.S. Attorney's office, representing defendants, filed a motion to dismiss asserting failure to state a cause of action and other grounds. After long deliberations, the district court on February 25, 1991, granted dismissal, Appen 11, on the ground the complaint was not filed within the six-year statute of limitations in 28 USC 2401(a), supra p.4, for suits against the United States.

1991 Court of Appeals Proceedings. On July 15, 1991, appellees filed a "dispositive motion" in the Court of Appeals urging "summary affirmance". Under the procedures of the D.C. Circuit Court ap-

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violation of the First Amendment issued 33 years earlier was declared void. There have been a score of appellate decisions annulling judgments for violations of due process. For a discussion of such cases generally, see Moore, p.60-221 thru 237, and Wright and Miller, Federal Practice and Procedure, Section 2862, p. 198-200.

plicable to motions, appellants were allowed five days to respond to this motion, with no further pleadings or papers authorized. Appellants' necessarily brief response urged, inter alia, that the issues were highly inappropriate for summary decision, and the appeal should proceed by normal briefing, to be heard by a special panel of judges. Counsel offered cooperation in constituting a special panel, which he noted could be composed of senior judges, of designated non-DC Circuit Court judges, or of regular active judges recusal of which was waived. The Chief Justice of the United States subsequently designated a panel of three senior judges of the Federal Circuit Court of Appeals. On December 20, 1991, with no further papers filed or hearing, the Special Panel ordered summary affirmance, issuing a published decision, Appen 1-6. The Masons filed a petition for rehearing with sug-

gestion for rehearing en banc. Denial occurred by orders filed March 23, 1992, Appen 7-10.

Special Panel Reasoning. Without reference to the historic nature of remedies for relief from judgment, the Special Panel has followed a narrow course of reasoning.[9] It has concluded: (1) the cause of action "accrued" immediately when the unreasoned 1982 decision was issued; (2) no attempt at any post-decision remedy in the same court was required before filing an independent action; (3) the action is against the United States, and thus 28 USC 2401 is applicable; and (4)

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[9]The decision brushes the past aside by stating, "We know of no basis upon which a district court may entertain an independent action to modify a judgment of a court of appeals and particularly when that judgment affirmed a prior judgment of the district court," Appen 6. The enormous body of established law contra is discussed in Moore, cited infra. In light of these clear precedents, reasoning (1) and (2)of the decision, next discussed, has opened a wide door to future complaints.

whether or not a F.R.C.P. Rule 60(b)(4) or (b)(6) motion could have been filed in district court makes no difference to the outcome. Each of these decisional legs is plainly wrong, as explained hereafter.

ARGUMENT

Overview of Why the Writ Should Be Granted.

1. Unexplained decisions violate minimum standards of appellate due process. None of the advisory bodies involved in launching 1972-73 Court of Appeals rule changes designed to reduce the number of decisions published in official reports ever recommended that appellate decisions could be issued without reasons, Appen 32-33 (Recommendations of D.C. Bar Section on Courts, Lawyers, and The Administration of Justice, October 15, 1991). On the contrary, there was, unanimous opposition to any such course, op.cit., Appen 48-49. Because arbitrary

decision-making is repugnant to the very idea of appellate review, the D.C. Bar Board of Governors in November 1991 unanimously endorsed urging the D.C. Circuit Court of Appeals to issue a reasoned decision in each case, Appen 27 (D.C. Bar Section letter November 25, 1991). The repugnant practice of arbitrary, unexplained decision-making, adopted without Congressional, public, bar, or reasoned Supreme Court approval, is a misguided departure from basic canons of Anglo-American law that should be ended immediately.

2. No-citation, no-publication rules are a failed experiment. Experimentation with the use of unpublished, non-citeable decisions in U.S. appellate courts has now been tried for 20 years. In recent recommendations to the D.C. Circuit Court a responsible D.C. Bar section has urged that this practice be abandoned for a variety of compelling reasons: appellate

courts, including the D.C. Circuit, have been found not to follow their own publication criteria (Appen 37, 42); the selection of cases to receive a published opinion is inherently subjective (id.), yet discriminates severely between litigants in its practical consequences since important intra- and inter-Circuit conflicts are hidden (Appen 40, 46), and Supreme Court review of an unpublished decision has proven virtually unobtainable;[10] numerous instances of abuse have been suspected where panels have been unwilling to make their decisional reasons public (Appen 40, 41, 46); studies of court performance are impeded by the unaccessibility surrounding unpublished decisions (Appen 46, 47). In combination with use of unreasoned decisions, the Courts of Appeals

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[10]In principle, a non-citeable decision does not establish a "precedent," and does not reach the level of national importance justifying Supreme Court review.

have increasingly made summary, unpublished affirmances the order of the day (Appen 41, 42-44, 47),[11] denying an effective right of appeal (Appen 39, 46, 47).

The chairman of the 1972 national Advisory Committee that recommended experimentation with unpublished decisions, and two other Committee leaders, have withdrawn their support for this approach based on its operation (Appen 45-48).[12] All serious studies of summary, unpublished disposition practices have been condemnatory (Appen 48-49).

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[11]Under rules in effect after 1972 the number of reversals in U.S. Courts of Appeals nationwide has fallen steadily, from 19.4% in 1972 to 12.4% in 1990, despite substantially fewer cases considered "on the merits". (Administrative Office of US Courts Annual Report Table B-5).

[12]Further, on April 29, 1992, the Advisory Committee on Procedures of the D.C. Circuit Court of Appeals reiterated its 1984 recommendations to the court. It "respectfully urge[d] the Court to consider...new developments and reexamine whether some modification of the non-citeability rules is now warranted," Letter of Douglas Letter, Chairman, to Judge R. B. Ginsburg, a defendant.

3. Thousands of litigants are being affected. Court rules that allow unreasoned, unpublished, non-citeable decisions are now affecting the vast majority of appeals cases. Statistics on the D.C. Circuit in the early 1980's appear supra p. 13. For the year ending June 30, 1990, the Annual Report of the Administrative Office of U.S. Courts reported that 55% of the D.C. Circuit Court's decisions "on the merits" were unpublished (table S-3). Adding to that percentage the court's far greater number (60%) of terminations before reaching the merits (e.g., motions cases such as this one), on which a published decision is almost never issued, its non-publication rate overall in 1990

was 76%.[13] In other Circuits the non-publication rate in 1990 was even higher.[14]

4. Review under S. Ct. Rule 10 lies for "unusual" proceedings and national importance. No Supreme Court review has previously been granted to the appellate rules contested in this case that are a radical departure from the previously accepted and usual course of judicial proceedings in U.S. Courts of Appeals, and raise important questions of Federal law. S.Ct. Rule 10.

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[13]As late as 1986, 44% of D.C. Circuit Court terminations on the merits that year were reported as "unsigned, without comment" (table S-5). The 1990 report indicates a drastic decline for the D.C. Circuit, but with high percentages in certain other circuits. The D.C. Circuit clerk responsible for the 1990 statistics was unable to explain to counsel what changes in procedure, if any, had reduced the number of opinions reported as "without comment". In any event, the table does not include motions cases, nor indicate the extent of comment, and nothing prevents a return to, or continuation of, unreasoned decision-making.

[14]On "merits" terminations alone it was, for example, 84.2% in the Fourth Circuit, 79.5% in the Sixth Circuit.

Dismissal below was not granted for failure to state a cause of action. It is inferable that the complaint states a right of action to compel appellate court adherence to required standards of law, that grave issues needing decision on the merits are adequately raised by the complaint. Narrowly, the only legal issue present is whether the statute of limitations found in 28 U.S.C. 2401(a), supra p.4, is a bar to reaching the merits. For the reasons given hereafter, the decision below conflicts with applicable decisions of this court, with cogent authority, and this Court should reverse and direct consideration of the merits.

I. SIX YEARS HAS NOT LAPSED UNDER 28 U.S.C. 2401(a) UNDER ESTABLISHED EQUITABLE PRINCIPLES.

The Special Panel decision holds that the cause of action herein "first accrued" on "October 20, 1982, when this court decided the appeal in a summary order of

affirmance and without an opinion," Appen 4. The Court concludes that the Masons needed no further knowledge, but "could have brought the present suit the day following our affirmance," Appen 5. Under established equitable principles, this reasoning is plainly wrong.

A. An Independent Action In Equity For Relief From Judgment Was Not Sustainable Until Petitioners First Pursued An Available Remedy In The Same Court.

The leading commentary on historic remedies for relief from judgment is Moore's Federal Practice. Moore states flatly: "An independent action will not lie...where the complainant negligently failed to press the matter in the original action," citing cases, p. 60-383.

A basic principle of equity ignored by the Special Panel (which cites no authority for its erroneous holding) is that "he who invokes [equity] to vacate a judgment or decree must, to prevail, be free

from negligence," City of Kansas City v. Union Pacific Railway, CCA8 1911, 192 F. 316, 317.

The Masons in 1982 had an available, discretionary remedy in the same court, a petition for rehearing, that could have provided relief. They utilized it, strongly urging that the court's failure to address the serious issues presented was inexcusable, supra p. 10. Had the Masons applied to a court of equity on October 21, 1982, for immediate relief from the Court of Appeals' judgment, they would have been refused relief under classic principles on the ground of having failed to "press the matter in the original action." In consequence, it was not until at least the denial of their petition for rehearing on December 21, 1982, supra p. 11, that an independent cause of action in equity "first accrued." Thus, the complaint herein, filed on December

13, 1988, was filed within six-years. For this inescapable, powerful reason alone, the decision below is plainly wrong and should be reversed.[15]

B. The Broad Cause Of Action Herein Was Not Possible Until Petitioners Acquired Facts Not Known Or Available Until Well After The October 1982 Judgment Was Issued.

While it is true that the D.C. Circuit Court's failure to give meaningful reasons for its October 1982 judgment is a major portion of the present cause-of-action, the Special Panel too hurriedly concludes (Appen 4) that no knowledge other than that available when the summary affirmance occurred was needed to formulate the broad complaint herein.

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[15]In the judgment relief case of Brown v. County of Buena Vista, 1877, 95 U.S. 157, 159-160, this Court said: [R]elief...is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law."

As stated supra, p. 12-13, no official statistics, or Clerk's office assistance, were available to counsel on the court's summary affirmance and publication practices. It was only substantially later that counsel learned, in 1985, of an unpublished 1984 study by the D.C. Circuit Court's Advisory Committee on Procedures, supra p. 13-14. This study revealed the Court's undisclosed-to-the-bar 1973 Plan for Publication of Decisions, and gave detailed statistics on decision-making practices in the 1981-1983 period under local rules 8(f) and 13(c). The present complaint relies heavily on these factual discoveries, supra p. 11-15, in its multi-count assault on rules 8(f) and 13(c), Appen 50 ff., and supra p. 11, 15.

Accordingly, the Special Panel's reliance on Oppenheim v. Campbell, CADC 1978, 571 F2d 660, Appen 5, is entirely misplaced. Pertinently, Oppenheim at 662

acknowledges that concealment of essential facts can toll a statute of limitations. The controlling principle, as this Court said in U.S. v. Kubrick, 1979, 444 U.S. 111, 122-123, is that knowledge of a cause of action will not be imputed unless obtainable by "reasonable diligence".

Thus it is clear, for an independent second reason, that the Special Panel's conclusion that six years lapsed after cause of action accrual before the present complaint was brought is plainly wrong, and should be reversed.

II. 28 U.S.C. 2401(a) IS, HOWEVER, NOT APPLICABLE AS A BAR TO THE PRESENT COMPLAINT

In light of Argument I, it is not strictly necessary to determine whether 28 U.S.C. 2401(a) might otherwise be applicable to the complaint. In any event, it is not, for sound reasons not appreciated by the Special Panel.

Ignoring historic principles and a vast literature of cases, the panel has reasoned erroneously, first, that 2401(a) applies to "every civil action" without exception, Appen 5. Second, it asserts the complaint "cannot be viewed" as a Rule 60(b) motion to obtain relief "in the court and in the action in which the judgment was rendered," Appen 6, nor succeed as an independent action for the panel "know[s] of no basis upon which a district court may... modify a judgment of a court of appeals," id. Third, "even if... considered such an independent action," it is said the suit "still would be time barred" because a 1946 Advisory Committee Note to Rule 60(b) states such actions are subject to "laches or statutes of limitations," id.

There are three fundamental reasons, each overlooked, why the Special Panel is mistaken in believing that U.S. sovereign

immunity is implicated in the allegations present in the complaint. It has failed to consider that: (1) the complaint is only nominally against the United States; (2) the United States is necessarily subject to the same civil rules that apply to civil parties generally, including those regarding relief from void judgments; (3) where a judgment contest occurs in a district court which has entered, or enrolled, an appellate judgment attacked as void, the district court has ancillary jurisdiction, and full power, to reach the issues. This authority may be invoked either by a F.R.C.P. 60(b)(4) or (b)(6) motion, which this complaint can be treated as, or by an action in equity.

The complaint is not "against the United States." The Special Panel concludes that the complaint is "against the United States" as it is "against the active judges of this court and the United

States," Appen 2. But, significantly, the United States was an original party, via its then corporation, the Panama Canal Company, and the active judges of the court are defendants of an unusual kind: They are recusable since responsible for its local rules under contest.

Suits have been held not "against the United States" where the judgment sought would not "expend itself on the public treasury or interfere with the public administration," Wright, Miller and Cooper, Federal Practice and Procedure, (hereafter "Wright"), Vol. 14 (2nd ed. 1985), Section 3655, p. 217-230, 218. Certain leading principles, Wright states, at p. 225, are that "suits for specific relief against officers will not be suits against the United States if the officer acted outside the scope of his or her statutory authority," citing Larsen v. Domestic & Foreign Commerce Corp., 1949, 337 U.S. 682, 689-

690, and Dugan v. Rank, 1963, 372 U.S. 609. Further: "[A]ctions [that] are ultra vires... may be made the object of specific relief [where] unconstitutional [since] the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign," id., p. 227-230.

Given the constitutional-violation nature of the claims in the complaint, together with the reasons discussed hereafter, the Special Panel's conclusion that Section 2401(a) operates as a bar is improper. It prevents reaching the merits by begging the central question of the complaint.

The United States is subject to the same civil rules as other litigants. There is not one set of civil rules in U.S. district courts that apply to the United States, and another set for all other litigants. If relief is obtainable

under court remedies and rules against a judgment when secured by a private party, the same remedies and rules necessarily apply when the judgment has been obtained by the United States. For authority so holding, see Moore, p. 60-320.

The district court below has ancillary jurisdiction, and full power, to address the issues, whether treating the complaint as an independent action in equity or as a Rule 60(b) motion. Had the Special Panel not ignored a vast body of judgment relief law, it would have realized that ancillary jurisdiction of a broad nature for judgment relief purposes is possessed by a U.S. district court when its judgment has been affirmed on appeal, and/or it has enrolled an appellate judgment after receiving the mandate, and new issues arise.

The Special Panel's mistaken belief that the district court below is not a

suitable forum for the issues presented has already been answered, to the contrary, by this Court in Standard Oil of Calif. v. US, 1976, 429 U.S. 17, striking down appellate leave requirements for post-appeal Rule 60(b) motions. As Moore states:

> "In Standard Oil of California v US... the US Supreme Court, faced with the type of situation where a post-appeal Rule 60(b) motion was made that would disturb the judgment which the appellate court's mandate ordered...struck down the appellate leave requirement in those types of cases. In so ruling, the Court rejected the reasoning that an appellate court's mandate barred the trial court from later disturbing the judgment entered in accordance with the mandate, and that the leave requirement protected finality of judgments... The Court stated, 'Like the original district court judgment, the appellate mandate relates to the record and issues then before the court and does not purport to deal with possible later events...'" (citing 97 Sup. Ct. 32).

What is true for a Rule 60(b) motion is likewise true for an independent action in equity.[16]

It is highly significant, in regard to the question of US sovereign immunity, that the complaint herein has not been brought in a district court different from the original court, but in the same court having original jurisdiction over the parties. (In this respect, the complaint is not an "independent" action in the full sense.) Because of resulting ancillary jurisdiction by the district court, together with the basic procedural similarity between a Rule 60(b) motion and an in-

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[16]Moore states: "[A]n independent action will lie to obtain relief from a judgment affirmed or otherwise entered pursuant to the mandate of an appellate court, without leave of the appellate court [citing cases], particularly in light of... Standard Oil of Calif...," p. 60-365. "A federal court can entertain an original action to enjoin or otherwise grant relief from a judgment or decree rendered not only by it, but also by another federal court," id.

dependent action brought in the original district court, it is possible to say in this case that there is no valid logical basis for deeming sovereign immunity implicated by the present complaint. As Moore states:

> "No independent jurisdictional ground is needed to support the [60(b)] motion proceeding which is ancillary to or in effect a continuation of the [original] action..." p.60-308. [A] motion under 60(b) for relief from a judgment in [a civil] action [to which the US is a party] may be made by or against the United States and, in the latter event, without the necessity of any consent by the sovereign." p. 60-320.
>
> "Court of Registration. If a judgment is originally rendered in one court and then registered in another, we believe that this latter court is sufficiently a court of rendition...that an independent action to obtain relief in the court of registration, would be supported by ancillary principles." p. 60-398, ft. 3.
>
> "Ancillary jurisdiction is sufficiently broad so that the action may be maintained against a person who was not a party to the original proceeding." p. 60-398.
>
> "[A]n independent action may be treated as a proceeding under 60(b)," p. 60-348. "There is very little

> procedural difference between such a federal independent action [in the same court which rendered the judgment] and a 60(b) motion," p.60-368.
>
> "While it would appear from authority that an independent action is not maintainable against the United States, absent some express authorization, we believe that such an independent action when brought in the court which rendered the judgment should be regarded as a continuation of the original former action, in accordance with the Pacific Railroad of Missouri [1884, 111 U.S. 505, 522] doctrine, that is maintainable against the United States, with or without consent, and that elementary principles of fairness and justice demand this conclusion." p. 60-398,-399.

These principles and conclusions, supported by, and evolved from, a vast body of cases, are logically at their strongest, moreover, when relief is sought from a judgment attacked as void. This is true because it is settled law that no time limit governs a Rule 60(b)(4) motion or independent action for setting aside a void judgment. Wright, Section 2862, p. 197-200, states flatly: "[T]here is no time limit on an attack on a judgment as

void," p. 197. Moore explains at pages 60-218 thru 242 that, prior to the Federal Rules, relief from a void judgment could be secured by a variety of means, including audita querela, bill of review, independent action in equity, or collateral attack, p. 60-218,-219. "The...independent action [was] not subject to any fixed time limitation...", Moore states, id. This rule applies also to a collateral attack, and to a Rule 60(b)(4) attack, p. 60-219,-224.

It follows from the above that the Special Panel has misapplied the brief quote taken from the 1946 Advisory Committee Note to Rule 60(b). Historically, neither laches nor statutes of limitation apply to independent actions for relief from a void judgment.

For all of the foregoing reasons, Section 2401(a) emphatically does not op-

erate as a bar to prevent the merits of the complaint from being reached.

III. PROCEEDING BELOW BY SUMMARY AFFIRMANCE WAS AN ABUSE OF PROCESS

The Special Panel has passed summarily on the highly important, first impression issues present in this case. It has done so by an inaccurately reasoned opinion that ignores decisions of this court, and a vast body of settled authority, in a procedure allowing five days to respond to a dispositive motion. The cited "justification" for this procedure, Walker v. Washington, CADC 1980, 627 F2d 541, 546, Appen 2, provides no support since in Walker a pro se appellant presented claims which the court concluded were "frivolous." The claims in this case are patently not frivolous and deserve the most serious consideration possible by a Court of Appeals. For all of the reasons given herein, petitioners submit that the Spe-

cial Panel has acted with an abuse of discretion in granting summary affirmance, and this Court should exercise its supervisory power to set the decision aside.

CONCLUSION, RELIEF REQUESTED

For the foregoing reasons, a Writ of Certiorari should issue to review the December 20, 1991, judgment, and March 23, 1992, orders denying rehearing, of the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Certificate of Service

The undersigned counsel hereby certifies that 3 copies of the foregoing Petition for Writ of Certiorari have been served on respondents by delivery to their counsel of record below, R. Craig Lawrence, Assistant US Attorney, Judiciary Center Bldg., 555 4th St., NW, Rm 404, Washington, D.C. 20001, and that 3 copies have been mailed, first class postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, on this _____ day of June, 1992.

_____

Edward Earl Wright
Attorney for Petitioners

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided December 20, 1991

No. 91-5141

IRVIN H. MASON, PHYLLIS H. MASON, and THE MASON ENGINEERING COMPANY,

PLAINTIFFS-APPELLANTS,

v.

THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN REGULAR ACTIVE SERVICE ACTING IN THEIR OFFICIAL CAPACITIES, and

THE UNITED STATES, as successor to the Panama Canal Company,

DEFENDANTS-APPELLEES.

On Motion for Summary Affirmance of Judgment of the United States District Court

---

Edward E. Wright for the appellants.

Jay B. Stephens, United States Attorney, *John D. Bates* and *R. Craig Lawrence,* Assistant United States Attorneys for the appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before COWEN, BENNETT, and FRIEDMAN, *Senior Circuit Judges of the Federal Circuit,* sitting by designation.

Opinion for the Court filed by *Senior Circuit Judge* FRIEDMAN.

FRIEDMAN, *Senior Circuit Judge.*

This is an appeal from the judgment of the United States District Court for the District of Columbia dismissing as time-barred a complaint against the active judges of this court and the United States. The government has moved for summary affirmance. We conclude that the decision of the district court is so clearly correct as to warrant summary disposition. *Cf. Walker v. Washington,* 627 F.2d 541, 545 (D.C. Cir.), *cert. denied sub nom. Walker v. Barry,* 449 U.S. 994 (1980). We therefore grant the motion to affirm and affirm the judgment of the district court.

I

A. This case is a sequel to a previous suit that Irvin, Phyllis, and Lark Mason and the Mason Engineering Company filed in 1974 in the United States District Court for the District of Columbia against the Panama Canal Company. That case stemmed from the company's dismissal of the appellant Irvin H. Mason from his position there as an engineer. According to the appellants, Mason was dismissed for whistleblowing activities. The suit alleged several personnel and tort claims.

The district court dismissed some of the counts in the complaint on the Canal Company's motion. After trial to the court, the court entered findings of fact and conclusions of law dismissing the remaining count. On appeal, this court, after briefing and oral argument, summarily affirmed the district court judgment on October 20, 1982, pursuant to our Local General Rules 13(a), 13(c), and 8(f) (all now superseded by General Rule 14). Our judgment stated in pertinent part as follows:

> While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

> On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the judgment of the District Court appealed from in this case be and hereby is affirmed for the reasons articulated in its Memorandum Opinion and Order, filed May 11, 1979, and on the basis of its Findings of Fact, Conclusions of Law and Order, filed August 24, 1981.

The judgment also directed the clerk to withhold the mandate until seven days after the disposition of any timely petition for rehearing.

The appellants filed a petition for rehearing with suggestion for rehearing *en banc* which challenged, among other things, the disposition of the case without a published opinion. This court denied rehearing (and rejected the suggestion for rehearing *en banc*) on December 21, 1982. The Supreme Court denied certiorari. *Mason v. Panama Canal Co.*, 460 U.S. 1086 (1983).

B. On December 13, 1988, more than six years after this court's summary affirmance, Irvin and Phyllis Mason and Mason Engineering Company (the Masons) filed the present case in the district court. The suit named as defendants the active judges of this court "in their official capacities" and the United States, as successor to the Panama Canal Company. The Masons sought a declaration that the rules and practices of this court, under which the earlier suit was summarily affirmed without an opinion, were unlawful, and a new hearing before this court in the prior case that will result in a published explanation of the basis for decision.

In a memorandum opinion, the district court dismissed the complaint as barred by the six-year limitations period in 28 U.S.C. § 2401(a) (1988).

II

Section 2401(a) of Title 28 provides:

> [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

A. This court has not previously directly addressed the question whether a suit against federal officials challenging their official actions is a suit against the United States under this provision. We have so recognized, however, by applying that statute to such suits. *See, e.g, Walters v. Secretary of Defense,* 725 F.2d 107, 111-15 (D.C. Cir. 1983); *Calhoun v. Lehman,* 725 F.2d 115, 117 (D.C. Cir. 1983); *Impro Prod., Inc. v. Block,* 722 F.2d 845, 849-50 (D.C. Cir. 1983), *cert. denied,* 469 U.S. 931 (1984); *Oppenheim v. Campbell,* 571 F.2d 660, 662-63 (D.C. Cir. 1978). In *Saffron v. Department of the Navy,* 561 F.2d 938, 941-42 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1033 (1978), we held that § 2401(a) covered a suit "nominally against named federal officials" but seeking money damages from the government, since the suit "was in every sense a 'civil action commenced against the United States'" under § 2401(a). *Id.* at 941-42 (citing *Dugan v. Rank,* 372 U.S. 609, 620-23 (1963)).

We now make explicit, as did the Fifth Circuit in *Geyen v. Marsh,* 775 F.2d 1303, 1307 (5th Cir. 1985), what was implicit in our prior decisions, namely, that a civil action against a federal official based on that person's official actions is a "civil action commenced against the United States" under § 2401(a).

B. 1. The district court correctly held that the six-year limitations period in § 2401(a) bars the present suit. The gravamen of the complaint is that this court erred in deciding the prior appeal without an opinion. The "right of action" thus asserted "first accrue[d]" on October 20, 1982, when this court decided the appeal in a summary order of affirmance and without an opinion. Since the present suit was not filed until December 13, 1988, more than six years after our decision of affirmance was issued, it is time-barred under § 2401(a).

2. The Masons seek to avoid the force of this reasoning by contending that their action did not accrue until December 12, 1982, when their petition for rehearing was denied. This court's decision, however, was final when it

was rendered on October 20, 1982. The Masons' claim, challenging only the failure of this court to render an opinion, accrued at that time. The Masons knew then that the court would not render an opinion in deciding their appeal, and that was the point in time at which their claim based upon the lack of an opinion accrued.

The Masons could have brought the present suit the day following our affirmance. The claim of an improper failure to render an opinion was thus ripe for judicial challenge at that time, and there was no need for the Masons to seek rehearing prior to asserting the claim. *See Oppenheim,* 571 F.2d at 662 (action accrued, for purposes of § 2401(a), when the "right to resort to federal court was perfected").

3. The Masons contend that because their claim is for equitable relief from a judgment, § 2401 does not apply to and cannot bar it. Section 2401(a), however, broadly bars "every civil action" unless filed within six years of its accrual. In *Spannaus v. United States Dep't of Justice,* 824 F.2d 52, 55 (D.C. Cir. 1987), this court stated that "[t]he law of this circuit is clear: the words 'every civil action' mean what they say," and that this court's prior decisions "clarify beyond dispute that § 2401(a) applies to all civil actions whether legal, equitable or mixed."

4. Finally, the Masons contend that the six-year limitation period of § 2401(a) does not apply to an independent action attacking a judgment as void or to a motion under Federal Rule of Civil Procedure 60(b)(4) or (b)(6) for relief from a judgment. They characterize the present suit as either such an action or motion.

Federal Rule 60(b) authorizes two procedures to obtain relief from judgments: 1) a motion in the court and in the action in which the judgment was rendered, which may be filed within a "reasonable time" after entry of the judgment; or 2) a new and independent action, which may be commenced in a court other than that which rendered the judgment. FED. R. CIV. P. 60(b); 7 Moore's Federal Practice ¶ 60.18[8], p. 60-142 (1991) [hereinafter Moore's].

Since the present suit is brought in the district court against the judges of this court (and the United States) and seeks to reopen the 1982 judgment of this court, it cannot be viewed as a motion to obtain relief in the court and in the action in which the judgment was rendered. *See* FED R. CIV. P. 60 advisory committee note, 1946 amendment; Moore's, *supra,* at ¶ 60.18[8], p. 60-142.

If the present case is viewed as an independent action to relieve a party from a judgment, it also fails. We know of no basis upon which a district court may entertain an independent action to modify a judgment of a court of appeals, and particularly when that judgment affirmed a prior judgment of that district court. To permit such an independent action would be inconsistent with the first procedure of the rule providing for filing a motion in the court that rendered the judgment. Moreover, even if the Masons' suit could be considered such an "independent action," it still would be time-barred. The advisory committee on the rules stated that "[w]here the independent action is resorted to, the limitations of time are those of laches or statutes of limitations." FED. R. CIV. P. 60 advisory committee note, 1946 amendment. The governing statute of limitations for such a suit would be 28 U.S.C. § 2401(a), and under this provision the action is time-barred because it was commenced more than six years after it accrued.

CONCLUSION

The judgment of the district court is

affirmed.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 91-5141 Sept. Term, 1991

CV 88-3542

Irvin H. Mason, et al., Appellants

Filed Mar. 23, 1991

v.

Judges of the United States Court of Appeals for the District of Columbia Circuit in Regular Active Service in their official capacities, et al.

BEFORE: Cowen, Bennett and Friedman, Senior Circuit Judges*

O R D E R

The Clerk is directed to file appellants' lodged petition for rehearing and suggestion for rehearing en banc and upon consideration of the petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

*of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 91-5141 Sept. Term, 1991

CV 88-3542

Irvin H. Mason, et al., Filed Mar. 23, 1991

Appellants

v.

Judges of the United States Court of Appeals for the District of Columbia Circuit in Regular Active Service in their official capacities, et al.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges, and Cowen*, Bennett* and Friedman*, Senior Circuit Judges

O R D E R

Appellants' Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Wald, Edwards, Ruth B. Ginsburg, D. H. Ginsburg and Sentelle did not participate in this matter.

*of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al., Plaintiffs,	)	
v.	)	Civil Action No. 88-3542(TFH)
THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, et al., Defendants.	)	Filed Feb 25, 1991

MEMORANDUM OPINION

Before the Court is defendants' motion to dismiss the complaint on the bases of lack of case or controversy, expiration of the applicable six-year statute of limitations, and collateral estoppel. Having considered defendants' motion, plaintiffs' opposition, and the supporting memoranda, the Court shall grant the defendants' motion and dismiss plaintiffs' complaint as barred by the statute of limitations.

BACKGROUND

The origin of this case is an unsuccessful suit by plaintiffs, Irvin and Phyllis Mason and Mason Engineering Corporation, against the United States, as Successor to the Panama Canal Company. Mason v. Panama Canal Co., Civil Action No. 74-0872. The district court dismissed plaintiffs' tort claims and rejected plaintiffs' constitutional claims following a 1980 trial. Complaint at ¶ 11. Plaintiffs appealed and a three-judge panel of the court of appeals affirmed on October 20, 1982. Mason v. Panama Canal Co., No. 81-2231 (D.C. Cir. October 20, 1982). The court of appeals affirmed the judgment of the district court "for the reasons articulated in [the district court's] Memorandum Opinion and Order, filed May 11, 1979, and on the basis of its Findings of Fact, Conclusions of Law and Order filed August 4, 1981," and on

the basis of "full consideration of the issues" without further elaboration of its reasoning./[1] Plaintiffs petitioned the court of appeals for rehearing urging, among other issues, that summary disposition was inappropriate. Complaint at ¶¶ 12-13. After rehearing was denied on December 21, 1982, plaintiffs petitioned for writ of certiorari, which the Supreme Court denied on March 21, 1983. Complaint, ¶¶ 14-15.

Plaintiffs seek a declaration that the court of appeals' former local rules allowing summary affirmance and unpublished opinions, and implicitly its current rule 14, are unlawful on their face and violated

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1 The court of appeals' unpublished, summary affirmance was pursuant to its then local rules 13(a), 13(c) and 8(f), since superseded by its similarly phrased local rule 14, which provides the court discretion to issue abbreviated dispositions of cases and unpublished opinions. General Rules of the United States Court of Appeals for the District of Columbia Circuit (1987).

the statutory and constitutional rights of plaintiffs as applied.[2] The complaint must be dismissed due to plaintiffs' failure to comply with the six-year statute of limitations prescribed for civil actions against the United States. 28 U.S.C. § 2401(a).[3]

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2 Plaintiffs' claims rely on the equal protection and due process clauses of the United States Constitution, as well as 28 U.S.C. §§ 41-49, 1291, 2071, and 2072.

3 Although it is unnecessary to reach the merits of this complaint, at least three circuits have upheld local court rules allowing for summary affirmances against statutory and constitutional challenges. Furman v. United States, 720 F.2d 263 (2nd Cir. 1983)(no grounds for cause of action because Congress has implicitly authorized decisions without opinion through rule 36 of the Federal Rules of Appellate Procedure); United States v. Baynes, 548 F.2d 481 (1977) (summary affirmance is not violative of constitutional due process); NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970)(summary affirmance pursuant to local rule is within discretion of court).

Plaintiffs cite Taylor v. McKeithen, 407 U.S. 191 (1972), in which the Supreme Court granted certiorari to vacate and remand for clarification following the Fifth Circuit's summary reversal of a

DISCUSSION

The plaintiffs' cause of action and the injuries alleged in the complaint stem from the court of appeals' October 20, 1982 decision by summary affirmance. The complaint in this action was filed December 13, 1988, six years and nearly two months after the appellate court's action.

The applicable statute of limitations, codified at 28 U.S.C. § 2401(a) provides, in relevant part that "every civil action commenced against the United States shall be time barred unless the complaint is

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3 (cont.) trial court. Taylor is distinguishable from the present challenge of a summary affirmance. Moreover, the Supreme Court in this action had the opportunity to vacate and remand but declined to do so. Notably, the dissent in Taylor was especially supportive of the right of appellate courts to decide cases summarily. Taylor, 407 U.S. at 195 (Rhenquist, J., dissenting)("no existing statute or rule of procedure prohibits the Fifth Circuit from issuing a short opinion and order, as it has done here, or from deciding cases without any opinion at all.")

filed within six years after the right of action first accrues." As stated by this circuit, "unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed....Where clear language restricts jurisdiction, we may not overturn it merely by invokimg spirits and thrusts." Spannaus v. United States Dept. of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987)(citations omitted). The Supreme Court has repeatedly endorsed this strict observance of § 2401. Irwin v. Veterans Administration, __ U.S. __, 111 S.Ct 453 (1990)(White, J., concurring); Lehman v. Nakshian, 453 U.S. 156, 161 (1981); United States v. Kubrick, 444 U.S. 111, 117 (1979).

Plaintiffs' suggestion that the statute does not apply to their claim is unpersuasive and ignores the plain text of

§ 2401(a), covering "every civil action," and the recent opinions of this circuit that "clarify beyond dispute that § 2401(a) applies to all civil actions whether legal, equitable or mixed." Spannaus, 824 F.2d at 55 (citing recent cases of the District of Columbia Circuit). Plaintiffs' alternative argument -- that their right of action first accrued not when the court of appeals issued its summary affirmance on October 20, 1982, but when that court denied the plaintiffs' motion for rehearing on December 21, 1982 -- is contrary to the relevant case law and to common sense.

For the purpose of applying §2401, a right of action first accrues when the plaintiff knows or reasonably should know of both the existance and the cause of his injury. United States v. Kubrick, 444 U.S. 111 (1979); Page v. United States, 729 F.2d 818 (D.C. Cir. 1982). The injuries complained of emerged from the

appellate court's action on October 20, 1982. On that date the plaintiffs knew of both the existance and cause of their alleged injury. 4/ Plaintiffs had six years to invoke the aid of the court and failed to do so. Plaintiffs' attempt to recharacterize the relevant event as the court of appeals' later denial of the petition for rehearing ignores the clear meaning of the statute and its strict

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4/ As in Mohasco Corp. v. Silver, 447 U.S. 807, 818, "we are not confronted with a case in which it is claimed that the plaintiff was reasonably unaware of the existance of his cause of action until after the expiration of the limitations period." c.f. United States v. Kubrick, 444 U.S. 111 (medical malpractice action).

application by federal courts. 5/ Accordingly, the Court shall, by Order issued herewith, dismiss the complaint pursuant to 28 U.S.C. §2401(a).

Dated: February 25th, 1991

Thomas F. Hogan
United States District Judge

5/ Even if the court of appeals denial of rehearing is the significant event for statute of limitations purposes, as plaintiffs insist, the complaint could nonetheless be dismissed on collateral estoppel grounds. If the court of appeals had plaintiffs' arguments against the summary affirmance proceedure before it when considering the petition for rehearing as is candidly recognized in the complaint, then the issues before this court have already been litigated on the merits. Complaint at ¶ 13.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No.
THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, et al.,	)	88-3542(TFH)
	)	Filed
	)	Feb 26, 1991
Defendants.	)	

O R D E R

In accordance with the Memorandum Opinion issued herewith and for the reasons therein, it is this 25th day of February, 1991,

ORDERED that the defendants' Motion to Dismiss is GRANTED, and it is

FURTHER ORDERED that this case is hereby DISMISSED WITH PREJUDICE.

Thomas F. Hogan
United States District Judge

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRVIN H. MASON, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No.
THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, et al.	)	88-3542 (TFH)
	)	Filed
	)	Apr 2 - 1991
Defendants.	)	
	)	

O R D E R

Upon Consideration of Plaintiffs' Motion to Alter of Amend Judgment, Defendants' opposition and the entire record, it is this 2 day of April, 1991

ORDERED that plaintiffs' Rule 59 Motion By Plaintiffs To Alter Judgement is hereby denied.

/s/
UNITED STATES DISTRICT JUDGE

R. CRAIG LAWRENCE
Assistant United States Attorney
Judiciary Center Building, Room 4104
555 4th Street, N.W.
Washington, D.C. 20001

EDWARD E. WRIGHT, ESQUIRE
1819 H Street, N.W., Suite 560
Washington, D.C. 20006

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 81-2231 Sept. Term, 1982

Irvin H. Mason, et al.
Appellants

Civil Action No. 74-00872

v.

Panama Canal Company/
Government Stockholder,
et al.

Filed Oct. 20, 1982

Argued 10-14-82

Appeal from the United States
District Court
for the District of Columbia

Before ROBINSON, Chief Judge,
TAMM, Circuit Judge, and
LUMBARD,* Senior Circuit
Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the

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*Of the United States Court of Appeals for the Second Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the judgment of the District Court appealed from in this cause be and hereby is affirmed for the reasons articulated in its Memorandum Opinion and Order, filed May 11, 1979, and on the basis of its Findings of Fact, Conclusions of Law and Order, filed August 24, 1981.

It is further ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam
For the Court

George A Fisher, Clerk

Local Rules, U.S. Court of Appeals
For the District of Columbia Circuit
In Force in 1982

Rule 8(f): "CITATIONS IN BRIEFS...Unpublished orders, including explanatory memoranda of this Court, are not to be cited in briefs or memoranda of counsel as precedents. However, counsel may refer to such orders and memoranda for such purposes as application of the doctrines of res judicata, collateral estoppel, and law of the case, which turn on the binding effect of the judgement, and not its quality as precedent. See Rule 13(c)..."

Rule 13(c): "ORDER FORM OF DECISION. In accordance with recommendations for improvement of judicial administration, 1/ this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by and order of a decision or judgment of a court or administrative agency, a judgment of a court or administrative agency, a judgment of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum. See Rule 8(f)..."

1/ "Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19 --American Bar Association Cannons of Judicial Ethics; position adapted by the Judicial Conference of the United States -- March 16, 1964."

November 25, 1991 (202)887-1504

Douglas N. Letter, Esq.
Advisory Committee on Procedures
of the U.S. Court of Appeals for
the District of Columbia Circuit
U.S. Department of Justice
Civil Division
Appellate Staff
10th & Pennsylvania, N.W.
Washington, DC 20530

Re: Proposal of D.C. Bar Section of Courts, Lawyers and Administration of Justice on D.C. Circuit Rules 11 and 14

Dear Mr. Letter:

As co-chairs of the Steering Committee of the D.C. Section on Courts, Lawyers and Administration of Justice, we are transmitting to the Advisory Committee a recommendation prepared by the Court Rules Committee that the D.C. Circuit make certain changes to its rules concerning the publication of opinions and the citability of unpublished decisions. The

principal changes recommended by the Section are that the Court furnish a written explanation for the basis of its decision in all cases and that written decisions that are not formally published in West's Federal Reporter series nevertheless be citable as precedent.

The Committee should be aware that this recommendation was considered extensively by the Court Rules Committee and approved unanimously by our Section Steering Committee. It was also considered by the Board of Governors of the D.C. Bar. At the request of James Robertson, D.C. Bar President, the Board considered the recommendation at its regular meeting in May, June and November. At its November 12 meeting, the Board declined to adopt a motion endorsing the recommendation by a tie vote, 8-8. Although Board members were divided on the Section's recommendation

that less formally published decisions should be citable as precedent, there was virtual unanimity among the members of the Board on the recommendation that the court should be required to issue a written explanation of the basis of its decision in each case.

We urge the Advisory Committee to consider seriously the enclosed recommendation.

Sincerely,

Carol E. Bruce

Randell H. Norton

COMMITTEE ON COURT RULES OF THE
COURTS, LAWYERS AND THE ADMINISTRATION
OF JUSTICE SECTION OF THE
DISTRICT OF COLUMBIA BAR

RECOMMENDATIONS FOR AMENDMENTS TO RULES
11(C) AND 14 OF THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carol Elder Bruce, Cochair
Randell Hunt Norton, Cochair
Hon. Eric H. Holder, Jr.
Jeffrey F. Liss
Donna M. Murasky
David A. Reiser

Steering Committee, Courts, Lawyers and
the Administration of Justice Section,
D.C. Bar

Richard B. Nettler, Cochair
Thomas C. Papson, Cochair
Joel Bennet
Brian Busey*
Anthony C. Epstein
James R. Klimaski
Michael K. Madden
Michael E. Zelinski

Committee on Rules

October 15, 1991

*/ Principal author with Edward E. Wright,
a member of the District of Columbia Bar

STANDARD DISCLAIMER

The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMENTS OF THE SECTION ON COURTS, LAWYERS,
AND THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR
ON LOCAL RULES 11(C) and 14

The United States Court of Appeals for the District of Columbia Circuit has adopted rules that establish a presumption against publication of opinions, and permit the Court to decide cases and dispositive motions without any opinion at all. Experience with these rules since their adoption, and scholarly commentary on these and similar rules in other Circuits leads the Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar to propose that the Court amend its rules and return to the prior practice of issuing and publishing opinions or explanatory memoranda in every dispositive decision. Specifically, for the reasons set out in more detail below,

BEST AVAILABLE COPY

the Section urges that the Court amend Local Rule 14 to read as follows:

- Rule 14
OPINIONS OF THE COURT

(a) POLICY

It is the policy of this Court to ~~publish opinions and explanatory memoranda found to have general public interest~~ publish an opinion, memorandum, or other statement explaining the basis of its disposition of each case, whether decided on the merits or by dispositive motion. Publication may be either in printed, bound volume reports or in loose-leaf paperback form.

. . .

(c) ABBREVIATED DISPOSITIONS IN LOOSE LEAF FORM.

This court may, while according full consideration of the issues, dispense with published opinions in printed, bound volume reports where this issues occasion no need therefor, and confine its action

to ~~such~~ an abbreviated disposition ~~as it may deem appropriate, e.g., affirmance by order of a decision or judgement of a court or administrative agency, a judgement of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum.~~ Such abbreviated disposition shall contain a sufficient explanation of the basis of the Court's disposition.

. . .

In 1972 the Judicial Conference of the United States adopted certain proposals that originated with a national Advisory Council for Appellate Justice. The proposals, designed to conserve time and to reduce the number of published printed opinions, contemplated (1) creation of a category of opinions that would not be designated for publication unless they met certain criteria, and (2) that unpublished opinions would not be citable

as precedent.[1] The D.C. Circuit acted on these proposals in 1973, but went further than the recommendations, providing also that an opinion could be dispensed with altogether. These rules were never approved by Congress or the Supreme Court.

The 1973 rules were modified in 1987, but since 1973 have provided essentially as follows: (1) The Court may dispense with a written opinion and may resolve matters by "abbreviated disposition," including affirmance by order; in short, it may resolve cases without any statement of the reasons for its decision.[2] (2) Where it decides to issue an opinion or other explanatory memorandum, the Court will not publish

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[1] For background, see William L. Reynolds and William M. Richman, The Non-Precedential Precedent -- Limited Publication and No Citation Rules in the U.S. Court of Appeals, 78 Colum. L. Rev. 1167, 1170-71 (1978).

[2] Local Rule 14(c)

its opinion unless the opinion meets certain criteria; in short, there is a presumption against publication of opinions.[3] (3) Unpublished dispositions may not be cited as precedent.[4] After the 1973 rule change and the adoption of the 1973 Plan for Publication of Opinions, there occurred almost immediately a significant decline in the number of cases decided by the D.C. Circuit that received published opinions or any statement of reasons for decision. In fiscal 1974 and 1975, it was reported that "37% of all cases fully briefed in the D.C. Circuit were disposed of without opinion."[5] For the period

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[3] Local Rule 14(b). This policy was originally embodied in an unpublished Plan for Publication of Opinions, adopted in 1973. The plan was not made public until 1984, after the Court's own Advisory Committee urged its publication.

[4] Local Rule 11(c).

[5] Morrison, Alan B., Decisions Without Reasons: A Crisis in the D.C. Circuit, District Lawyer 36-38, Vol.1/No.1, 1976.

January 1981 through November 1983, an exhaustive study found that the D.C. Circuit issued 888 published decisions in cases in which it reached the merits (i.e., after full briefing and submission), while disposing of 539 cases without explanation and an additional 233 cases by unpublished memorandum.[6] During this period, the Court also disposed of 1,735 appeals on presubmission motion orders with no published opinion, and generally with little explanation accompanying the order.[7] In other words, during this

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[6] "Report and Recommendations of the Advisory Committee on Procedures Concerning Unpublished Dispositions by the United States Court of Appeals for the District of Columbia Circuit," 3-4 (Daniel M. Gribbon, chair, June 8, 1984) (unpublished) [hereinafter "Advisory Committee Report"].

[7] "Report of the Subcommittee on Unpublished Opinions of the Advisory Committee on Procedures to the United States Court of Appeals for the District of Columbia Circuit," 42-43 & Exhibits F-G (Paul L. Friedman, chairman, May 1984) (unpublished) [hereinafter "Subcommittee Report"].

three-year period, where the Court reached the merits, 53.5% of the cases were decided with a published opinion, 32.5% with no explanation, and 14% with an explanation that was not published. Of all cases disposed of by the Court, only 26.1% received a published opinion; 67% received no explanation,[8] while 6.9% received an explanation that was not published. It can reasonably be expected that the proportion of the cases decided without opinion or without a published precedential opinion will continue to grow.[9]

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[8] Cases decided by motion order are assigned to the "no explanation" catagory.

[9] In remarks to the D.C. Bar shortly after becoming Chief Judge of the D.C. Circuit in July 1986, Chief Judge Wald said, "There is little question in my mind that more cases will be decided in the future without published opinions -- by order or memorandum -- . . . than [at] present . . ." Excerpts from remarks by Wald, Patricia M., entitled Rebel Angel in Flight: Chief Judge Patricia M. Wald on the U.S. Court of Appeals, District Lawyer 30, 34 (July/Aug. 1986).

One such study was prepared by this Court's own Advisory Committee on Procedures, which issued a detailed report on unpublished memoranda in 1984.[10] The report concluded, on the basis of a 200-page subcommittee study of all unpublished explanatory memoranda in calandar year 1983, that 40% of these opinions met the Court's own criteria and should have been published.[11] The Committee urged that the Court's publication criteria be made public; and more objective;[12] but it concluded that decisions to publish "will inevitably reflect the experience and values of the decisionmaker"[13] -- that is, would necessarily be subjective. The Committee declared that "a presumption in

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[10] Advisory Committee Report, supra note 6.

[11] Id. at 4.

[12] Id. at 7.

[13] Id. at 8.

favor of publication is warranted,"[14] and recommended that "the no-citation rule should be eliminated."[15] It also recommended that all opinions or other explanatory memoranda be made available to the public in some manner, such as being indexed for reference purposes.[16] The report of the subcommittee, which was chaired by Paul L. Friedman, noted serious constitutional problems with "a body of secret law that is not published and cannot be cited."[17] The Due Process Clause of the Fifth amendment, it observed, "guarantees a right to procedural regularity" and "a substantive right to freedom from

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14 Id. at 8.

15 Id. at 9.

16 Id. at 10.

17 Subcommittee Report, supra note 7, at 2.

arbitrary governmental action."[18] Further, the Equal Protection Clause "guarantees a right to equal treatment . . . in the absence of compelling governmental [justification]."[19] The full committee stated:

> The Subcommittee . . . demonstrates that within our judicial framework stare decisis has historically promoted judicial legitimacy by insisting that each decision be constrained by precedent and itself constrain future dispositions. When a decision is neither published nor accorded precedential effect, public scrutiny is minimized, and a safeguard against unfair decisions is eliminated. Where neither stare decisis nor public scrutiny are seen to constrain judicial

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18 Id. at 35.

19 Id.

authority, respect for the judicial process may be reduced.[20]

In a 1976 article that also specifically addressed the D.C. Circuit's experience, Alan B. Morrison described instances in which the Court decided important civil and criminal cases "by simple order, without the slightest explanation of the basis of the decision."[21] In one criminal case Government counsel acknowledged that the issues were serious; yet an unpublished summary affirmance was later reversed en banc only because, fortuitously, another panel shortly thereafter handed down a contrary decision that was published. In a civil matter, eleven members of Congress brought two challenges to a multi-billion dollar federal patent policy. The key

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20 Advisory Committee Report, supra note 6, at 9.

21 Morrison, supra note 5, at 36.

question of standing, decided differently in the two district court judgments, "provoked more than 100 pages of briefs"; but was disposed of by a simple citation followed by "compare," the very question in the two cases.[22] Morrison concluded that, "in far too many criminal and civil cases affecting the lives of countless Americans, fundamental rights are being denied by the D.C. Circuit without any stated reasons."[23] Summary affirmances, he concluded, were "an easy way to avoid troubling questions."

The D.C. Circuit is not the only court that has had to confront this issue. Other Circuits have instituted substantially similar (but not identical) local rules, many following the 1972 Judicial Conference proposals. These rules have been

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22 Id. at 37.

23 Id. at 38.

extensively studied, and have universally attracted unfavorable comment. Commentators have repeatedly found that publication criteria are inconsistently and arbitrarily applied, that important decisions have not been published, and that important issues have been raised on appeal that were disregarded in summary dispositions.

For example, Prof. Charles J. Haworth made a detailed study of Fifth Circuit experience with rules antedating, but similar to, the D.C. Circuit's 1973 rules.[24] In 1968, faced with the heaviest caseload of any Circuit, the Fifth Circuit adopted case screening and summary procedures that introduced the practice of deciding cases without a written opinion. Prof. Haworth's study reported that, as summary affirmances without opinion grew, the court's overall

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[24] Haworth, Charles J., Screening and Summary Proceedures in the U.S. Courts of Appeals, 1973 Wash. U. L.Q. 257.

percentage of reversals began to decline substantially. During the 28 years before the new rules were adopted, the Fifth Circuit had reversed approximately 27% of judgments appealed, with only minor year-to-year variation. Under the new rules, by 1971, the reversal rate fell to 19.9%, and by 1972 it fell to 14.9%. Thus, the chances of an appellant securing a reversal declined from better than 1 in 4 before 1968 to only 1 in 7 by 1972. In the same period, no change occurred in the reversal rate of other Circuits studied.[25]

Prof. Haworth attributed the decline in reversals to the sheer time saving involved in a simple "Affirmed";[26] to the advantages of "a one-line disposition of an entire case" over the traditional per

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[25] Similar results have been found in other circuits...

[26] Id. at 271-72.

curiam decision, for purposes of "protecting the court" from an embarrassing "aperture into [its] reasoning";[27] and to the fact that opinion-writing results in "uncovering uncited authority . . . or changing [a] vote on the merits after seeing a draft opinion prepared."[28] He expressed concern that the "use of affirmances without opinions leaves litigants with the impression no one really heard their appeal . . . . The rule is . . . subject to abuse . . . , subordinates justice to speed, and subverts needed improvements [in court administration] to illegitimate ends."[29]

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27 Id. at 272.

28 Id. at 319.

29 Id. at 273. Prof. Haworth concluded that in a three-year period the Fifth Circuit's opinion-dispensing rules had operated to prevent over 100 cases from being reversed, on a historical basis. Id. at 317.

Finally, it is worth noting that three of the leaders of the Advisory Committee that inspired the 1973 rules -- Prof. Maurice Rosenberg (Columbia Univ.), who was the committee's chairman, Prof. Paul D. Carrington (Duke Univ.), and Prof. Daniel J. Meador (Univ. of Virginia) -- have withdrawn their support for the nonpublication and no-citation rules, and have condemned both these and no-opinion rules on multiple grounds.[30] Though acknowledging the "heavy increases in workload" confronting appellate courts, the writers jointly concluded that certain "imperatives" are "essential to appellate justice" and cannot be sacrificed to caseload problems.[31] They observed that appellate adjudication traditionally serves two functions: for individual

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30 M. Rosenberg, P. Carrington & D. Meador, Justice on Appeal, West Publishing Co. (1976).

31 Id. at 1-12, 31-41.

litigants, it is a review for correctness; institutionally, it promotes uniformity. Neither function can be served, however, they concluded unless judges announce the reasons for their decisions.[32] Experience with nonpublication and no-citation rules "raises difficulties which are as distressing as the problems that non-publication is designed to overcome."[33] The difficulties include "a state of disarray" in multi-panel courts that is "hard to cure because counsel are prevented from [citing] contradictory . . . decisions"; "a serious risk of abuse by judges who prefer to secrete some decisions which should be published"; and the effect of nonpublication on "reduc[ing] the visibility of the correcting function" and on "increasing . . . general anxiety about the integrity of the

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32 Id. at 9-10.

33 Id. at 37.

legal process at all levels."[34]

On the other hand, public disclosure of reasons for decision "assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the . . . approval of the whole social order as represented by its legal system."[35] The authors warned that a shift to "mass production methods" now in progress, by "an imperious judiciary that acts without the need to justify its judgments," is causing changes that, "projected to their conceivable extremes [will] leave an appellate process which gives little or no assurances to individual litigants that the appeal has served the correcting function. At the same time, the institutional function is also jeopardized . . . [as a] growing

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34 Id. at 38-39

35 Id. at 2

uncorrectedness of lower court judges and administrative agencies [develops], . . . by degrees cut loose from the increasingly remote and erratic controls of the [appellate court]."[36]

Other studies have led to equally strong condemnations of similar appellate rules by their authors. See, e.g., Reynolds and Richman, supra note 1, at 1174-75 ("the practice under these rules -- failure to provide the parties . . . with any hint of the court's reasoning -- has been uniformly condemned by commentators, lawyers, and judges"); R. Martineau, Modern Appellate Practice: Federal and State Civil Appeals 241-42 (1983) ("[t]he 'no-opinion' decision has been justified solely on the grounds of workload"; but "those who have studied the need for written opinions have almost without exception concluded that some type

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36 Id. at 7, 32.

of opinion should be prepared in every case", citing, interalia, Roscoe Pound, Appellate Procedure in Civil Cases, 3 (1941); National Advisory Council on Appellate Justice, Standards for Publication of Judicial Opinions, 4 (1973); and ABA Task Force on Appellate Procedure, Efficiency and Justice in Appeals: Methods and Selected Materials, 125-26 (1977); also, Wm. L. Reynolds and Wm. M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.of Chicago L.Rev. 573 (1981); Baker, Thomas E., A Compendium of Proposals to Reform U.S. Courts of Appeals, 37 U. Fla. L. Rev. 225 (1985); Robel, Lauren K., The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L.Rev 940 (1989).

In light of the serious difficulties of principle and practice caused by the

no-citation and no-opinion rules, the Section strongly recommends amendment of Local Rules 11(c) and 14. The proposed amendments embody a revised approach to publication and citation that will restore the essentials of prior practice, but still allow less-extensively-reasoned opinions to be prepared, where appropriate, that will receive more informal dissemination than other opinions.

. . .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Irvin H. Mason, Phyllis H. Mason, and Mason Engineering Corporation, 1578-22-B Moorings Drive Reston, VA 22090 Plaintiffs, v. The Judges of the U.S. Court of Appeals for the District of Columbia Circuit in Regular Active Service in Their Official Capacities, United States Courthouse Washington, DC 20001, and The United States, as Successor to the Panama Canal Company, United States Attorney United States Courthouse Washington, DC 20001 Defendants.	Civil Action No. 88-3542 COMPLAINT Filed 12/13/88

Plaintiffs allege, as follows:

. . .

COUNT ONE

18. Summary disposition by defendants' court of the serious issues raised by plaintiffs' counsel in case No. 81-2231, pursuant to defendants' Local Rules ...

13(c), 8(f), and '73 Plan, violated plaintiffs' statutory rights to an appeal, established, inter alia, by 28 U.S.C. Sections 43(a) and 1291. In non-exhaustive explanation, plaintiffs state:

A. A litigant with a right of appeal is entitled to receive careful consideration of all issues raised on appeal and to receive a reasoned explanation of the appellate court's basis for decision in regard to such issues. An unexplained disposition of serious issues, including a disposition nominally adopting non-existent reasons in another opinion, is an arbitrary, unlawful deprivation of the right to an appeal.

B. A practice by an appellate court of issuing summary, unpublished dispositions, of depriving non-published dispositions of the force of precedent, and of operating under a presumption that appeals will not be handled by the

preparation of a published opinion are practices that systematically deprive appellants of basic protections historically defining and safeguarding the right of appeal.

COUNT TWO

19. Local Rules...13(c), 8(f), and '73 Plan of defendants' court, pursuant to which Case No. 81-2231 was summarily disposed, were issued by defendants and their predecessors without authority, and/or were invalidly applied to Case No. 81-2231, since said local rules under 28 U.S.C Section 2071 are inconsistant with Acts of Congress establishing a right of appeal. In non-exhaustive explanation Plaintiffs state:

A. The function of a court of appeals is to consider all serious arguments of counsel under a statutory obligation to correct error committed below.

B. By Local Rules...13(c), and

8(f), and '73 Plan, defendants unlawfully converted their court from a court of appeals for correcting error to a court of discretionary certiorari jurisdiction.

COUNT THREE

20. Summary disposition by defendants' court of the serious issues raised by plaintiffs' counsel in Case No. 81-2231, pursuant to defendants' Local Rules... 13(c), 8(f), and '73 Plan, violated plaintiffs' constitutionally protected rights under the Fifth and Fourteenth Amendments to Equal Protection of the law. In non-exhaustive explanation plaintiffs state:

A. An appellant with a right of appeal is entitled to receive treatment equal to that received by other appellants in the absence of a compelling governmental interest warranting disparate treatment. Treatment which denies to certain appellants, but grants to others, careful consideration of serious issues raised, a

reasoned explanation of the appellate court's basis for decision, correction of error committed below, and a published opinion that carefully relies on precedent and itself has future precedential effect cannot be justified by any compelling interest when exercised under subjective, arbitrary, improper and unlawful criteria such as those contained in Local Rules... 13(c), 8(f), and '73 Plan.

B. Selective denial of a precedential, reasoned, published exposition of its basis for deision by a panel of a United States Circuit Court of Appeals denies equal protection to the appellants affected since:

(1) disclosure of a possible conflict between panels is prevented, depriving the appellant of a specific basis for obtaining rehearing en banc under Federal Rules of Appellate Procedure 35(a).

(2) disclosure of a

possible conflict between Circuits is prevented, depriving appellant of a specific basis for obtaining a Writ of Certiorari from the U.S. Supreme Court under Supreme Court Rule 17.1(a);

(3) the absence of any reasoned basis for a panel's decision, and the denial of precedential effect to a decision, deprives the appellant, for all practical purposes, of all remaining Supreme Court Rule 17 grounds for obtaining a Writ of Certiorari related to importance of the grounds used for decision.

COUNT FOUR

21. Summary disposition by defendants' court of the serious issues raised by plaintiffs' counsel in Case No. 81-2231, pursuant to defendants' Local Rules ...13(c), 8(f), and '73 Plan, violated plaintiffs' constitutionally protected rights under the Fifth Amendment to Due Process. In non-exhaustive explanation

plaintiffs state:

A. Failure to disclose an appellate Court's basis for a decision in a reasoned, published opinion having precedential effect is a violation of the historic principle of stare decisis on which the common law is founded. Under that principle each decision rests on or is carefully derived from precedent, and in turn has precedential effect on future cases. In the absence of adherence to the principle of continuous precedent a court's decisions can have no due process legitimacy under the common law.

B. A practice of decision-making which makes certain decisions not subject to explanation or publication hides from the public the performance of a court and creates a discriminatory class of inferior decisions of a secret, second-class nature neither of which can be reconciled with due process.

C. Local Rules...13(c), 8(f), and '73 Plan contain no clear, objective standards to guide decision-making, and in consequence necessarily invite, tempt, cause, and fail to protect against, arbitrary conduct and abuse of power in the differentiation of cases, allowing judges to act for no reason other than to relieve workload congestion, to avoid difficult, distasteful, or time-consuming issues or to dispose of matters on a basis of prejudice, discrimination, or whim. Both the appearance, and the reality of arbitrary differentiation of cases by defendants' court has occurred in disregard of due process requirements.

D. Local Rules...13(c), 8(f), and '73 Plan necessarily operate in such a manner as to invite and encourage the panels of defendants' court to issue summary, unexplained affirmances of decisions below since a decision to reverse

the outcome below is likely to require preparation of a reasoned explanation. This invidiously inclines the panels of defendants' court toward an effortless acceptance of the judgment below in violation of due process.

E. Defendants' '73 Plan fundamentally tilted the panels of defendants' court toward the summary disposition of appeals by establishing a presumption against preparing published opinions. A systematic presumption of this nature cannot be reconciled with due process.

. . .